



Legal Update

March 2016

The Appeals Court holds that the defendant's absence from an apartment for a month pursuant to a 209A order prevented the Commonwealth from proving that he constructively possessed his handgun that he left unsecured in the apartment after he departed, but that the defendant's ownership of the handgun enabled the Commonwealth to prove that he violated the firearm storage statute pursuant to G.L. c. 140, § 131L.

COMMONWEALTH v. ALBERT LOVERING, 89 Mass. App. Ct. 76 (2016):

Background: In August 2011, the defendant's wife sought and obtained an abuse prevention order against him. The order required the defendant to stay away from the apartment he shared with his wife. The defendant was only allowed to return to the apartment with a police escort to pick up his belongings. A month after the abuse prevention order issued, the defendant's wife found the defendant's loaded handgun in the apartment she had shared with him for twelve years. The gun was in a leather pouch contained within an old wooden box among the defendant's other personal belongings on the floor of the living room. The defendant had not returned to the apartment since the order was entered.

The police charged the defendant with possession of a firearm without a firearm identification card, G. L. c. 269, § 10(h), violation of the storage statute, G. L. c. 140, § 131L, and violation of the abuse prevention order by failing to surrender the gun, G. L. c. 209A, § 7. The case went to trial and the defendant was convicted on all three charges. The defendant appealed the convictions and argued that there was insufficient evidence to prove he constructively possessed the firearm.

THE APPEALS COURT HELD THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT THE DEFENDANT CONSTRUCTIVELY POSSESSED THE FIREARM FOUND IN THE APARTMENT.

In order to establish constructive possession, “there must be evidence sufficient to infer that the defendant not only had knowledge of the item, but had the ability and intention to exercise dominion and control over it.” *Commonwealth v. Frongillo*, 66 Mass. App. Ct. 677, 680 (2006). Although the gun was found among the defendant’s personal effects, he no longer lived in the apartment. Since the defendant had not been in proximity of the gun for almost a month, there was no evidence as to when if ever he might return to the apartment, and there was no evidence that he was anywhere near the gun when it was found in September.

THE APPEALS COURT HELD THAT G. L. C. 140, § 131L, APPLIED TO WEAPONS THAT ARE NEITHER CARRIED NOR UNDER THE CONTROL OF THEIR OWNER OR OTHER AUTHORIZED USER.

While the Court reversed the defendant’s conviction relating to the constructive possession charge, it affirmed the convictions for unlawful storage of a firearm and for violating the abuse prevention order. The defendant’s wife had relayed to police that the “gun was her husband’s,” and she had found it in a leather pouch within a wooden box on the floor of the living room. The storage statute imposes liability on owners of firearms who have neither actual nor constructive possession of the weapons. Furthermore, the storage statute “applies to weapons when they are neither carried nor under the control of their owner or other authorized user.” *Commonwealth v. Patterson*, 79 Mass. App. Ct. 316, 318 (2011).

Lastly, the defendant violated an abuse prevention order by failing “to surrender all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses,” pursuant to G. L. c. 209A, § 3B. When the abuse order issued in August 2011, the defendant was mandated by law to turn over his all of his firearms which would have included this gun. The defendant failed to comply with the law and as a result the Court affirmed his conviction on this charge.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department’s legal advisor or prosecutor.

Commentary: Police are not required to allege that an offense occurred the same date that the evidence is seized. If police have probable cause to charge the crime on an earlier date, they may do so. In this particular case, the Commonwealth could have alleged that both the 10(h) and the improper storage charges occurred on a date prior to the issuance of the 209A order when the defendant lived in the dwelling. If that were the case, the court may have reached a different holding regarding the proof of the defendant's constructive possession of the handgun.

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